83-287



CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

1983 TERM

ARTURO FERNANDEZ, :

Petitioner, :

v. :

UNITED STATES OF AMERICA, :

Respondent. :

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

*PETITION FOR CERTIORARI*

HALL AND O'BRIEN, P.A.
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Attorneys for Petitioner
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(305) 374-5030

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

*AFFIDAVIT OF MAILING*

STATE OF FLORIDA )
) SS
COUNTY OF DADE )

I, ANDREW C. HALL, being duly sworn, state:

1. I am a member of the bar of this Court having been duly admitted on September 17, 1973. I am also a member of the Florida Bar having been duly admitted on December 2, 1968.

2. I am a Senior law partner in the firm of Hall and O'Brien, P.A. located at 1401 Brickell Avenue, Suite 200, Miami, Florida 33131, telephone number (305) 374-5030.

3. In my capacity as an attorney at Hall and O'Brien, P.A. and to the best of my knowledge, this firm prepared and mailed a Petition for a Writ of Certiorari on behalf of ARTURO FERNANDEZ against the UNITED STATES OF AMERICA on August 1, 1983.

4. The package containing 40 copies of the Petition for Writ of Certiorari was timely filed and deposited in a United States mailbox with first class postage prepaid on August 1, 1983, and was properly addressed to the Clerk of this Court within the time allowed for filing and three copies of the Petition was sent to each of the attorneys listed on the Certificate of Service below.

5. Pursuant to Rule 28 of the Supreme Court Rules, Affiant has timely filed the Petition for a Writ of Certiorari and can certify that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit was mailed as described above.

ANDREW C. HALL

SWORN TO AND SUBSCRIBED to before me this 1st day of August, 1983.

Notary Public
State of Florida at Large.

My Commission Expires: NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES NOV 24 1986
BONDED THRU GENERAL INSURANCE UND

*CERTIFICATE OF SERVICE*

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to MICHAEL L. PAUP, Chief, Appellate Section, United States Department of Justice, Washington, D.C. 20530 and Solicitor General, Department of Justice, Rex E. Lee, 10th and Constitution Avenue N.W., Washington, D.C. 20530 on this 1st day of August, 1983.

By:

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

*NOTICE OF APPEARANCE*

ANDREW C. HALL, of HALL AND O'BRIEN, P.A., 1401 Brickell Avenue, Suite 200, Miami, Florida 33131 (telephone (305) 374-5030) hereby files this his Notice of Appearance as counsel for Petitioner, ARTURO FERNANDEZ in this cause. All parties are hereby directed to provide the undersigned with copies of all pleadings filed in this cause.

I HERBY CERTIFY that a true and correct copy of the foregoing was mailed on this 1st day of August, 1983 to MICHAEL L. PAUP, Chief, Appellate Section,

United States Department of Justice, Washington, D.C., 20530 and Solicitor General, Department of Justice, Rex E. Lee, 10th and Constitution Avenue N.W., Washington, D.C. 20530.

Respectfully submitted,

HALL AND O'BRIEN, P.A.
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By: _____
ANDREW C. HALL

3775G263.NOT/is

## *QUESTION PRESENTED FOR REVIEW*

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS IN AFFIRMING THE DISMISSAL OF THE PETITION OF ARTURO FERNANDEZ FOR DETERMINATION UNDER TITLE 26 U.S.C. SECTION 7429 (B) AS TIME BARRED HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

## *PARTIES TO THE PROCEEDING*

All of the parties to the proceeding are contained in the caption of the case.

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*STATUTES*



*OTHER AUTHORITY*



3775G273.BR1/is

## *OPINIONS BELOW*

The opinion of the Eleventh Circuit Court of Appeals is reported at 704 F.2d 592. It is reproduced below at Appendix pages 3-4. The opinion of the district court is reproduced below at Appendix pages 5-6.

## *JURISDICTIONAL STATEMENT*

The judgment of the Eleventh Circuit Court of Appeals was entered on May 2, 1983.

This Court has jurisdiction pursuant to 28 U.S.C. §1254 (1).

## *CONSTITUTIONAL PROVISIONS INVOLVED*

(1) Internal Revenue Code, Title 26 U.S.C. §7429 (b) (1) (1976).

> Judicial review-
>
> (1) Actions permitted-Within 30 days after the earlier of-
>
> (A) the day the Secretary notifies the taxpayer of his determination described in subsection (a) (3), or
>
> (B) the 16th day after the request described in subsection (a) (2) was made, the taxpayer may bring a civil action against the United States in a district court of the United States for a determination under this subsection.

(2) United States Constitution, Amendment V

> *No person shall* be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of* life, liberty, or *property, without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphasis supplied).

## *STATEMENT OF THE CASE*

1. Course of Proceedings and Disposition in Court Below

---

This action was commenced to challenge the termination assessment against ARTURO FERNANDEZ AND INVERSAL ADMINISTRACION E INVERSONES LIMITED, a Columbian limited partnership by the filing of a Petition on November 16, 1981. Record at 1-10; [hereinafter (R.at 1-10)]. Appendix at 10 - 19; [hereinafter (App. at 10-19)]. As a basis for federal jurisdiction, Petitioner relied upon Title 26 U.S.C. §7429 (b) (1) (A).

The government served its Motion to Dismiss the Petition on the grounds that the Court lacked jurisdiction over INVERSAL ADMINISTRACION E INVERSONES LIMITED and the Court lacked venue for the action over the Petitioner ARTURO FERNANDEZ and INVERSAL ADMINISTRACION E INVERSONES LIMITED. (R. at 13) (App. at 20). The government also alleged in its Motion to Dismiss that the action by Petitioner was time barred by the time limitations contained in Section 7429 of the Internal Revenue Code. (R. at 13) (App. at 20).

Thereafter, Petitioner filed a Motion for Extension of Time for the Court below to make a determination with respect to the Petition. (R. 42-43). That Motion was granted on December 4, 1981. (R. at 44). The Petitioner timely responded to the Motion of the United States to dismiss his petition. (R. at 51-56). The Motion to Dismiss was heard before the Court on January 4, 1982. (R. at 61). The Court withheld ruling at the hearing and requested Memorandum of Law to be filed. (R. at 62-75).

On January 12, 1981, the Court below entered its Order of Dismissal finding that a prerequisite for seeking judicial review of the jeopardy (sic) assessment is compliance with the time limitations in 26 U.S.C. Section 7429 (b) (1). (R. at 76). Therefore, the Court below determined that in order to be timely this action had to have been commenced within thirty (30) days after the earlier of November 2, 1981 (the date of the secretary's notification) or September 12, 1981 (the 16th day after the August 27th request by Fernandez for a judicial review). The Court reasoned that since this action was not filed until November 16, 1981, it was clearly time barred. (R. at 76). Because the Court disposed of the matter based upon a time limitation, Petitioner's constitutional arguments and venue questions were not addressed. (R. at 77). Thereafter, the Court ordered that the Petition be dismissed. (R. at 77).

In addition, on January 12, 1982 the Court recognized the *ore tenus* Notice of Voluntary Dismissal without prejudice of the cause on behalf of INVERSAL ADMINISTRACION E INVERSONES LIMITED. (R. at 78). Therefore, the limited partnership having voluntarily dismissed its case did not appeal from the Order of Dismissal and is not a Petitioner before this Honorable Court. The Notice of Appeal to the Eleventh

Circuit Court of Appeals of ARTURO FERNANDEZ, individually, was filed on February 2, 1982. (R. at 79). The Eleventh Circuit Court of Appeals affirmed the District Court's rulings (App. at 3-4) and this petition for writ of certiorari followed.

2. *Statement of the Facts*

ARTURO FERNANDEZ is a non-resident alien who is not engaged in a trade or business in the United States but acts as a broker for non-resident aliens through the operation of bank accounts including accounts in the United States for the exchange of currencies throughout the world.

It was apparently based on the Petitioner's bank deposits that the Internal Revenue Service assessed income and asserted the termination assessment. ARTURO FERNANDEZ challenged the termination assessment by administrative review provided by the Secretary and when that result was not in his favor, he turned to the District Court for judicial review.

On August 3, 1981, the Secretary of the Treasury through his revenue officers and service representatives entered a termination assessment against ARTURO FERNANDEZ under Section 6851 of the Internal Revenue Code of 1954. (R. at 5) (App. at 14-15).

As a result of that termination assessment by the Secretary or his agents, the Internal Revenue Service filed a Federal Tax Lien against FERNANDEZ in the sum of $2,848,881.00 (R. at 5-8) (App. at 16). As a result of the termination assessment and the filing of a Federal Tax Lien, the Secretary executed a Notice of Levy on the National Bank of North America in New York against one account held in the name of the Petitioner INVERSAL and allegedly owned by FERNANDEZ. (R. at 1).

Within thirty (30) days after the day in which FERNANDEZ was furnished with the written statement called for by Paragraph (a) (1) of Section 7429 of the Internal Revenue Code in 1954, ARTURO FERNANDEZ requested an administrative review through counsel. (R. at 8-9) (App. at 17-18).

The Secretary was requested to determine whether or not the making of the assessment under Section 6851 was reasonable under the circumstances and whether the amount so assessed or demanded as a result of the action under the foregoing Section was appropriate under the circumstances. At the Secretary's request, the Petitioner's Appellate hearing was postponed until October 20, 1981. On November 2, 1981, the secretary denied Petitioner's claim that the Department of Treasury had unreasonably and inappropriately assessed income to Petitioner ARTURO FERNANDEZ. (R. at 10) (App. at 7).

Thereafter, on November 16, 1982, ARTURO FERNANDEZ filed his Petition for Determination under Title 26 U.S.C. Section 7429 (b) asking for the federal district court's judicial review of the termination assessment (App. at 10-19).

The District Court judge found that he was without jurisdiction to hear the Petition for Determination filed by ARTURO FERNANDEZ because the Petition was time barred. A timely appeal challenging the reasonableness of the termination assessment to the Eleventh Circuit Court of Appeals was filed. (App. at 9). On May 2, 1983, the Eleventh Circuit Court of Appeals affirmed the District Court's ruling and this petition for writ of certiorari followed.

## *ARGUMENT: REASONS FOR GRANTING THE WRIT*

### *SUMMARY OF THE ARGUMENT*

Pursuant to Rule 17 (1) (c) of the Supreme Court Rules, 28 United States Code, the Eleventh Circuit Court of Appeals, when it affirmed the District Court's ruling, decided an important question of federal law which has not been, but should be, settled by this Court. Through its affirmance of the dismissal of Petitioner's claim as time barred, the appellate court interpreted a new section of the Internal Revenue Code and such interpretation is of first impression to both this Court and the federal courts of appeals.

The District Court committed reversible error by narrowly construing the intent of Congress when it fashioned a judicial remedy for review of termination assessments under 26 United States Code §7429. The intent of Congress in providing review of termination assessments was to balance the power of the Internal Revenue Service to protect its revenue gathering function against the right of the taxpayer to speedy review. The Eleventh Circuit Court of Appeals found that the taxpayer must file on the earliest possible date provided by the Statute. The Statute, on the other hand, states that the taxpayer *may* file on the earliest possible date but also provides a later, alternative date. By finding the action below time barred, the Courts below denied judicial review as a threshhold question to the taxpayer and denied Petitioner the due process of law mandated by the Fifth Amendment of the Constitution of the United States. The intent of Congress in drafting Section 7429 was to provide expeditious judicial review within ascertainable time limits. The interpretation of the Statute by the Courts below resulted in a denial of all judical review of the termination assessment which was not waived by the taxpayer upon a fair reading of the Statute.

## *ARGUMENT*

### THE ELEVENTH CIRCUIT COURT OF APPEALS IN AFFIRMING THE DISMISSAL OF THE PETITION OF ARTURO FERNANDEZ FOR DETERMINATION UNDER TITLE 26 U.S.C. SECTION 7429 (B) AS TIME BARRED DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Until the Tax Reform Act of 1976, review of termination of a taxable year was to be conducted solely by the United States Tax Court under Internal Revenue Code Section 6866 which provided:

> Sec. 6866. REVIEW BY TAX COURT.
> (a) Filing of Petition - Within 30 days after the day on which there is notice and demand for payment under Section 6861 (a) or 6862 (a) or notice of termination of taxable period under Section 6851 (a), the taxpayer may file a petition with the Tax Court for a determination under this section.

The Tax Reform Act of 1976 added the requirement that a taxpayer must seek administrative review of the termination assessment as a prerequisite to filing a civil action against the United States in District Court for a judical determination. Section 7429(a) and (b) Internal Revenue Code of 1954. Section 7429 (b) (1) provides:

> Judicial review -
>
> (1) Actions permitted-Within 30 days after the earlier of-
>
> (A) the day the Secretary notifies the taxpayer of his determination described in subsection (a) (3), or

(B) the 16th day after the request described in subsection (a) (2) was made, the taxpayer may bring a civil action against the United States in a district court of the United States for a determination under this subsection.

The applicable Committee Reports explain this change in terms of a policy favoring the exchange of information between the Internal Revenue Service and the taxpayer. The Committee also sought to avoid court proceedings whenever possible. *Joint Commission on Internal Revenue Tax - 94th Congress 2d Session, Legislative History of the Internal Revenue Code of 1954* at 362 (1976).

The Joint Committee stated:

A determination made under new section 7429 will have no effect upon the determination of the correct tax liability in a subsequent proceeding. The proceeding under the new provision is to be a separate proceeding which is unrelated, substantively and procedurally, to any subsequent proceeding to determine the correct tax liability, either by action for refund in a Federal district court or the Court of Claims or by a proceeding in the Tax court.

The requirement that the Service give the taxpayer a written statement of the information upon which it relied in making the jeopardy or termination assessment and the provision for administrative review are provided *because Congress believed that this statement to the taxpayer and an opportunity for administrative review will allow the taxpayer and the Service to exchange information and, in most cases, either to work out a*

*solution satisfactory to both parties* or *at least to facilitate the court proceeding.* The provisions could delay court review for only 20 days, and, in the judgment of Congress, the delay appears to be more than counterbalanced by the likelihood that the court proceedings would be facilitated by the exchange of information and that some court proceedings could be avoided entirely.

The Act provides for expedited review of jeopardy and termination assessments by the district court because it is contemplated that taxpayers would find it easier and more convenient to bring an action in the district courts rather than in the Tax Court. In addition, since the Tax Court does not have permanent facilities (or judges or commissioners sitting) throughout the country, review of these procedures is likely to be less of a burden if placed in the district courts.

The Act also provides that, during the period necessary to complete administrative review, and, if administrative review is sought, during the period necessary to seek judicial review, property seized pursuant to a jeopardy or termination assessment may not be sold unless (1) it is perishable, (2) the taxpayer consents, or (3) the expenses of conservation or maintenance would greatly reduce the net proceeds. Where judicial review is sought, these restrictions also apply during the period until a judicial determination is made. [Emphasis supplied].

In support of the above legislative intent, the Ninth Circuit Court of Appeals has construed Section 7429 as a tool entitling the taxpayer to prompt relief:

> Section 7429 provides for summary review of termination and jeopardy assessments. Under §7429, a taxpayer is entitled to prompt administrative review by the Internal Revenue Service and judicial review by the district court. Prior to the enactment of §7429, taxpayers subjected to termination or jeopardy assessments were not provided with an avenue for speedy judicial review. See S. Rep. No. 94-938 (Part I), 94th Cong. 2d Sess. 363, *reprinted in* [1976] U.S. Code Cong. & Ad. News, pp. 2897, 3439, 3792-93. Section 7429 was added to the Internal Revenue Code by the Tax Reform Act of 1976 to alleviate the hardship that could be occasioned by a delay in review. *Nichols v. United States*, 633 F.2d 829 (9th Cir. 1980).

In light of this legislative intent, the taxpayer in this case should not have been penalized for his diligent attempt to deal with the assessment on the administrative level. In effect, the Court of Appeal's construction of the statute in the instant action has produced an effect expressly contrary to the intent of the framers of Section 7429, i.e., for two years Petitioner has experienced the hardship of the Government's unreasonable termination assessment with no judicial relief afforded him. If the ambiguous provisions of Section 7429 (b) on judicial review are construed strictly, the legislative intent of encouraging taxpayers to seek an administrative solution to the termination assessments rather than going to court would be defeated. Considering the Congressional intent of

favoring the administrative handling of termination assessments, the judicial review provision of 7429 (b) must be a permissive rather than mandatory time limitation on bringing a court action. This section must be construed to mean that the taxpayer has the option of (1) exhausting his administrative review before using additional legal resources and expense to bring suit against the government or (2) he could bring an action against the government within 30 days after the 16th day after he requested administrative review. Taxpayer FERNANDEZ submits that a permissive construction of the application of the ambiguous judicial review provision is more in line with the intent of Congress to promote administrative review and administrative solutions to ease the burden on the judicial system.

The Trial Court's denial of the taxpayer's petition based upon the alleged untimeliness of the suit, defeats the over-all statutory scheme of furthering administrative review. In addition, such a reading of the statute allows the Internal Revenue Service to use dilatory tactics to avoid giving the taxpayer a fair administrative review by simply postponing the administrative review hearing until after the time limitation has run under Section 7429 (b) (1) (B) [30 days after the 16th day after the administrative review request was made by the taxpayer]. In the instant case, there are circumstances under which a court should go beyond the express language of a statute in order to give force to Congressional intent because "the statute is ambiguous and a literal interpretation would thwart the purpose of the over-all statutory scheme and would lead to an absurd result". *United States v. Public Utilities Commission of California*, 345 U.S. 295, 97 L.Ed. 1020, 73 S.Ct. 706 (1953).

The intentions of the statutory drafters must control when "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, _____ U.S. _____, 73 L.Ed. 2d 973, 102 S.Ct. 3245 (1982). A reading of the Joint Committee's intent in drafting section 7429, *supra*, reveals that the purpose of the new statute was to enhance the taxpayer's access to administrative review and to "facilitate" the court proceeding. The legislative intent to cut off all judicial review is not reflected in the Joint Committee notes.

In this case, the Petitioner alleged that the Internal Revenue Service did not give him a fair administrative review. Now, the District Court has ruled that there can be no judicial review of that administrative review. At the request of the Internal Revenue Service, the administrative review hearing was postponed until October 20, 1981, or in other words, after the purported time when the taxpayer could seek judicial review in the District Court under Section 7429 (b) 1 (B). Taxpayer FERNANDEZ urged the lower court to find that the government's acts of delay and dilatory tactics in conducting the administrative review amounted to an estoppel to the argument that the taxpayer had failed to file its request for judicial review within the alleged time limitation under Section 7429 (b) 1 (B). *See* e.g., *Schuster v. Commissioner*, 312 F.2d 311 (9th Cir. 1962); *Lattimore v. United States*, 12 F.Supp. 895 (Ct. Cl. 1935). *See also* Note, *Equitable Estoppel of the Government*, 79 COL. L. REV. 551 (1979). The District Court disagreed and was affirmed on appeal.

The terms and time limitations of the statute which provide the only judicial review of termination assessments must be read in a consistent fashion to reach the result intended by Congress. Section 7429 was

enacted to provide the taxpayer with a prompt determination after the termination assessment, not to provide the Internal Revenue Service with an expedient means to deny a taxpayer judicial review of the reasonableness of a termination assessment. It is not inconsistent under the statute as drafted to say that the taxpayer may choose to extend the time for the rendering of the administrative determination and may extend the time for filing the court action by awaiting the Internal Revenue Service's administrative determination.

The intent of Congress can be gleaned from the Committee Report No. 94-938 which states:

> The House bill provided for expedited review of jeopardy and termination assessments by the Tax Court. *The committee amendment provides that such review is to take place in the District Court because it is contemplated the taxpayers would find it easier and more convenient to bring an action in the District Court.* In addition, since the Tax Court does not have permanent facilities (or judges or commissioners sitting) throughout the country, review of these procedures is likely to be less of a burden if placed in the District Courts. [Emphasis added].

If the Congressional intent is to make the taxpayer's job "easier and more convenient", it seems inapposite for the District Courts to favor a contorted reading of the statute which fails to give them jurisdiction to review termination assessments. 26 U.S.C. Section 7429 (B) (1) simply permits judicial action. The statute allows the taxpayer to choose the earlier of

two dates to bring his action for review in the District Court. The taxpayer may go to court within 30 days of the day the Secretary notifies the taxpayer of his determination (presumably adverse to the taxpayer). Or, if the Secretary delays over a 16 day period, the taxpayer may choose to wait only the 16 days for the determination of the Secretary and then may bring an action in the District Court within 30 days of that date. The District Court suggested in its Order of Dismissal that Petitioner's reading of the statute would allow a taxpayer to avoid the time limits and bring suit at any time after administrative review is concluded at the taxpayer's leisure of six months, one year or two years after review is concluded. (R. at 77). That is not true. The statute specifically says that the action must be brought within 30 days after the Secretary notifies the taxpayer of his determination. The judicial review provision of Section 7429 provides the taxpayer with exact dates from which he *may* choose the earlier date. A taxpayer should not be penalized by denial of judicial review by choosing the latter date instead of the earlier date and allowing the administrative review procedure to be fully utilized.

An example of the convoluted logic which results in denial of judicial review despite the remedial nature of the statute is the case of *Zakem v. United States*, 78-2 U.S.T.C. 9584 (W.D. Wis. 1978). In *Zakem*, the District Court dismissed the action because the taxpayer brought suit in the District Court within 30 days of notification from the district director of the determination with regard to his assessment.

The same reasoning was applied in *Bryant v. United States of America*, 81-1 U.S.T.C. 9296 (D. Tenn. 1981). In *Bryant* the plaintiff's complaint stated that on August 28, 1980 he received a letter of termination

assessment informing him that his tax year was terminated as of August 27, 1980 and that he was liable for a tax due of $72,536. Plaintiff did not, within 5 days, receive a written statement of information upon which the Secretary relied in making the assessment as required by statute. On September 23, 1980 Plaintiff filed a protest against the assessment, thereby invoking administrative review of the termination assessment. This letter was received by the defendant on September 26, 1980. A conference was held by the Regional Appeal's office on November 25, 1980 and the information on which the assessment was based was provided to the plaintiff. The complaint in this action was filed on December 9, 1980. The Court, in its order dismissing the complaint, stated that first, sub-section a of the Statute applied. The Court assumed that the conference held on November 25, 1980 by the Regional Appeal's office constituted the notice referred to in subsection (b)(1)(A) of 7429. The filing of plaintiff's action would have been timely for the next 30 days or through December 25, 1980. The Court examined the time sequence under sub-section b. The Court concluded that the plaintiff requested review of his assessment by way of a protest letter dated September 23, 1980. This letter was received on September 26, 1980. The Court assumed that notice was effective upon receipt, and the appropriate time period for filing included 16 days plus 30 days after September 26, 1980 or a final filing date of November 12, 1980. The Court found that because the November 12, 1980 date was the earlier of the two dates, it was the last day upon which an action could have been timely filed. Accordingly, the Court dismissed the plaintiff's action because it was filed on December 9, 1980 and was time barred by the statute.

The hard line taken by the District Courts in *Zakem* and *Bryant* is unnecessarily burdensome in its logic and departs from the Congressional intent to provide the taxpayer easy access to the courts for speedy resolution of termination assessments made by the Secretary.

In the instant case, the fundamental principle of law that a litigant must exhaust his administrative remedies is cut short by this unusual judicial review provision as interpreted by the Courts below. Prior to exhausting his administrative remedies, the taxpayer must forego judicial review because a statute is interpreted to mean mandatory filing on an earlier date despite the fact that the statute's permissive language expressly states that it *may* be filed on the earlier date. This interpretation offends due process of law principles as well as fundamental statutory interpretation principles. Wherever possible, courts should give statutes their clear meaning and take into account Congressional intent. In the instant case, the District Court departed from these principles and committed reversible error.

This Court should curb the egregious error committed by the District Court and affirmed by the Court of Appeals denying access to the federal courts where the Congressional intent was to allow a taxpayer to have speedy judicial review of administrative actions by the Internal Revenue Service because of the unusual, confiscatory nature of termination assessments. The taxpayer ARTURO FERNANDEZ was compelled to bear the burden of an early assessments of taxes and to bear the burden of levy and lien for payment of tax without any judicial review and was precluded from litigating in the Tax Court. It is for these reasons that the District Court should have been more generous in its interpretation of a remedial statute.

The Court of Appeals, by affirming the District Court's ruling, interpreted the time limitations of Section 7429 of the Internal Revenue Code inconsistently with the intent of Congress to provide the taxpayer with efficient and just relief and in so doing has denied Petitioner his constitutionally guaranteed right to due process and his day in Court. In the alternative, the language of Section 7429 is so ambiguous that, upon a fair reading of it, its permissive "may" language fails to give a taxpayer notice of his obligation to file upon the earlier dates mentioned in Section 7429 (b) (1). Although the *Zakem* and *Bryant* courts agreed with the Court of Appeals opinion issued in this action (App. at 3-4), no other Court of Appeals has directly addressed the statutory interpretation of Section 7429 (b) (1) with respect to timeliness of actions permitted. Thus, Petitioner raises an issue of first impression which is an important issue of federal law which has not been, but should be, settled by this Court.

## *CONCLUSION*

A writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered and entered on May 2, 1983 in this cause.

Respectfully submitted,

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1401 Brickell Avenue
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(305) 374-5030

BY: _____
ANDREW C. HALL

## *CERTIFICATE OF SERVICE*

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to MICHAEL L. PAUP, Chief, Appellate Section, United States Department of Justice, Washington, D.C. 20530 and Solicitor General, Department of Justice, Rex E. Lee, 10th and Constitution Avenue N.W., Washington, D.C. 20530 on this 1st day of August, 1983.

BY: _____
ANDREW C. HALL

3775G263.BRF/is
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83-287



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*APPENDIX*

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NOTE:

Subsequent to the submission of the Petition for Certiorari to the Supreme Court of the United States, this Appendix has been revised to comply with Rule 33 of the Supreme Court Rules. The Index to Appendix which follows, therefore, contains two columns of page numbers. The first column represents the original page references found in the Petition. The second column represents the matching, revised page numbers contained in this Appendix.

INDEX TO APPENDIX

FERNANDEZ v. UNITED STATES

Arturo FERNANDEZ and Inversal Administracion E Inversiones Limited, a Colombian Limited Partnership, Plaintiff-Appellant,

v.

UNITED STATES of America,

Defendant-Appellee.

No. 82-5161

Non-Argument Calendar.

United States Court of Appeals,

Eleventh Circuit,

May 2, 1983.

Taxpayer brought action challenging reasonableness of termination assessment by Internal Revenue Service. The United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., dismissed action as time barred, and taxpayer appealed. The Court of Appeals held that taxpayer's suit was time barred by taxpayer's failure to file suit within time limitations of statute providing for

judicial review of termination assessments.

Affirmed.

1. Internal Revenue - 4638

Taxpayer's suit challenging reasonableness of termination assessment by Internal Revenue Service was time barred by taxpayer's failure to file suit within time limitations of statute providing for judicial review of termination assessments. 26 U.S.C.A. §§ 7429, 7429(a)(2), (b)(1), 6851.

2. Internal Revenue - 4638

Time limitations of statute governing judicial review of termination assessments are mandatory and not permissive. 26 U.S.C.A. §§ 7429, 7429(b)(1).

---

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

This is an action to determine the reasonableness of a termination assessment under IRC § 7429(b). Upon motion by the government, the district court dismissed the action as time barred. We affirm.

On August 3, 1981, the Internal Revenue Service (IRS) made a termination assessment under IRC §6851 against the appellant, Arturo Fernandez. The termination assessment was for the taxable year January 1, 1981, to July 28, 1981, for $2,848,181. Upon notification, Fernandez was advised that a suit challenging the reasonableness of the termination assessment "must be filed within thirty days after the earlier of (1) the date the Service notifies you of its decision

on your protest, or (2) the sixteenth day after your protest."

[1, 2] On August 27, 1981, Fernandez requested an administrative review before the IRS pursuant to IRC §7429(a)(2). After the administrative review, Fernandez was notified by letter dated November 2, 1981, that the IRS would uphold its assessment. On November 16, 1981, Fernandez instituted this action in the district court under section 7429. After commencing a hearing on the government's motion to dismiss, the district court held that Fernandez violated the time limitations of section 7429(b)(1). The court reasoned that the time limitations of section 7429(b)(1) are mandatory and not permissive because to hold otherwise "[would] be incongruous with the legislative goal of prompt review and resolution." We agree with

the district court's conclusion and reasoning.

Section 7429 is a relatively new addition to the Internal Revenue Code. The objective of this section is to provide an "expedited" means of judicial review of termination or jeopardy assessments made by the IRS. S.Rep. No. 938 (Part I) 94th Cong.2d Sess. 364 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 3793. Fernandez argues that the court narrowly construed the limitations of section 7429(b)(1) and thus, effectively defeated the purpose of section 7429. We cannot agree with Fernandez's conclusion. Section 7429(b)(1) provides:

> Judicial review--
>
> (1) Actions permitted--Within 30 days after the earlier of--
>
> (A) the day the Secretary notifies the taxpayer of his determination described in subsection (a)(3), or
>
> (B) the 16th day after the request described in subsection (a)(2) was made, the taxpayer may bring a civil action against the United States in a district court of the United States

for a determination under this subsection.

The record reveals that on August 27, 1981, Fernandez requested a timely administrative review. On November 2, 1981, the IRS notified Fernandez of its actions. In order to meet the time limitation imposed by section 7429(b)(1), Fernandez had to file within thirty days after the earlier of November 2, 1981, or sixteen days after August 27, 1981. Since the earlier of the two dates was August 27, 1981, it is the date of measurement for purposes of section 7429(b)(1). The sixteenth day after August 27, 1981, was September 12, 1981. Therefore, Fernandez was required to commence action on or before October 12, 1981; instead, he filed on November 16, 1981, which was not the earlier of the two alternatives.

Alternatively, Fernandez argues that the provisions of section 7429(b)(1) are

permissive and not mandatory. The language of the statute itself negates such an interpretation. To adopt Fernandez's argument would mean the Congress intended that the taxpayer in every case would have thirty days following the administrative determination by the Secretary. If Congress had so intended it would have omitted the word "earlier" from the statute and replaced it with the word "either." The objective of the statute is to provide expedited review. S.Rep. No. 938 (Part I) 94th Cong.2d Sess. 364 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 3793. If we were to accept the rationale of Fernandez's argument, the objective of expedience would be defeated. We therefore affirm the decision of the district court dismissing the action as time barred.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-2531-Civ-SMA

ARTURO FERNANDEZ and INVERSAL ADMINISTRACION E INVERSIONES, LTD., a Colombian Limited Partnership,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER OF DISMISSAL

THIS CAUSE came before the Court upon the Respondent's Motion to Dismiss the Petitioner's Petition for determination of termination assessment under 26 U.S.C. §7429. The Court held a hearing on the pending motion to dismiss at which time counsel for Petitioner Inversal Administracion E Inversiones Ltd. conceded the merit of the Government's motion to dismiss Petitioner Inversal and voluntarily dismissed without prejudice Inversal's cause of action.

On August 27, 1981, Petitioner/Taxpayer Fernandez made a request by letter for administrative review from the Secretary of Treasury of a jeopardy tax assessment, pursuant to 26 U.S.C. §7429(a)(2). By letter dated November 2, 1981, the Secretary informed Fernandez that the making of the termination assessment was reasonable and that the amount so assessed was appropriate under the circumstances. Petitioner Fernandez filed this action for judicial review on November 16, 1981.

A prerequisite for seeking judicial review of a jeopardy assessment is compliance with the time limitations in 26 U.S.C. §7429(b)(1). Zakem v. United States, 78 U.S.T.C. ¶9584 (W.D. Wis. 1978); Strickland v. United States, No. 79-6549-CIV-JAG (S.D. Fla. Dec. 11, 1979) (unpublished opinion). Therefore, in order to be timely, this action had to be

commenced within 30 days after the earlier of November 2, 1981, the date of the Secretary's notification, or September 12, 1981, the 16th day after the August 27th request by Fernandez for judicial review. Since this action was not filed until November 16, 1981, it is clearly time barred.

Petitioner Fernandez argues that the time limitations are merely permissive rather than mandatory. However, the legislative intent in enacting 26 U.S.C. §7429 was to provide for review by the U.S. District Court on an expedited basis. S.Rep. No. 94-938, 94th Cong., 2nd Sess. p. 364. Petitioner's suggestion that Section 7429(b)(1) be construed to permit the taxpayer to avoid the time limits and bring suit at any time after administrative review is concluded would allow suits at the taxpayer's leisure six months, one year or

two years after the review is concluded. Such a construction would be incongruous with the legislative goal of prompt review and resolution.

Notwithstanding the holding in Malajalian v. United States, 505 F.2d 842 (2nd Cir. 1974), which recognized a rational reason for the unequal treatment preventing alien tax suits in the U.S. District Courts, Petitioner Fernandez insists that the venue provision, Section 7429(e), which excludes non-resident aliens from obtaining District Court review of termination assessments, is unconstitutional because it has the effect of precluding judicial review under Section 7429 and instead forces Petitioner to pursue other judicial remedies in the Court of Claims and Tax Court. However, in view of the Court's disposition of this case based on the failure of Petitioner to comply with the

statute's mandatory time limits, Petitioner's constitutional claims need not be addressed. See, Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

Having considered the argument of counsel and the record herein, it is

ORDERED AND ADJUDGED that Respondent's Motion to Dismiss is hereby GRANTED and this cause is DISMISSED without prejudice to seeking judicial review in any court of competent jurisdiction.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of January. 1981.

/S/

UNITED STATES DISTRICT JUDGE

Copies furnished to:

Randall M. Roden, Dept. of Justice
Andrew C. Hall, Esquire

INTERNAL REVENUE SERVICE

Regional Southeast Region

Mr. Andrew C. Hall
Hall & Hauser, P.A.
1401 Brickell Avenue
Miami, Florida 33131

Department of the Treasury

Address any reply to Appellate Division
Rm. 316, 51 S.W. 1st Ave., Miami,
Florida 33130

Person to Contact:

Joseph M. Rodriguez
Telephone No. (305) 350-4426

Refer Reply to:

AP:MIA:JMR

Date: Nov. 2, 1981

In Re: Administrative Review of
Termination Assessment for
the period 1/1/81 through
7/28/81 of Arturo Fernandez

Dear Mr. Hall:

We have considered the evidence and arguments submitted in the above-captioned matter and we have concluded that the making of the assessment by the District Director is reasonable, and the amount so assessed is appropriate under

the circumstances. This concludes the administrative review prescribed by Section 7429(a) of the Internal Revenue Code.

Sincerely,

/S/
Joseph M. Rodriguez
Appeals Officer

| DIST. /OFF. | /DOCKET YR. # | /FILING DATE / MO. DAY YR | /J/ | N/S / / |
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PLAINTIFFS

1-ARTURO FERNANDEZ
2-INVERSAL ADMINISTRACION E INVERSIONES LTD., a Colombian Limited Partnership

/ C-7 /

DEFENDANTS

UNITED STATES OF AMERICA

TAX SUIT:

26 USC 7429(b)(1)(A) & (B)

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

Petition for determination of termination assessment.

ATTORNEYS

HALL AND HAUSER, P.A.
1401 Brickell Ave.
Miami, Fl. 33131

ATLEE W. WAMPLER, III
U.S.A.
by Randall M. Roden, Trial Attorney
Tax Division
Dept. of Justice
Washington, D.C. 20530
Telephone: 724-6522

2/2/82 DC & CCA pd. (Pltf Fernandez)

NR. PROCEEDINGS
JS-5 X-Cards

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CIVIL DIVISION

CASE NO.

| | |
|---|---|
| ARTURO FERNANDEZ and INVERSAL ADMINISTRACION E INVERSIONES LTD., a Colombian Limited Partnership, | : |
| Petitioners, | : |
| vs. | : |
| UNITED STATES OF AMERICA, | : |
| Respondent. | : |

---

PETITION FOR DETERMINATION UNDER TITLE 26

ARTURO FERNANDEZ (FERNANDEZ) and INVERSAL ADMINISTRACION E INVERSIONES, LTD. (INVERSAL), by and through undersigned counsel, hereby brings this civil action against the United States of America in the District Court of the Southern District of Florida and in support thereof allege:

1. This Court has jurisdiction over this cause pursuant to Title 26 U.S.C.

Section 7429(b)(1)(A) & (B).

2 On August 3, 1981, the Secretary of the Treasury through his revenue officers or service representatives entered a termination assessment against FERNANDEZ under Section 6851 of the Internal Revenue Code, 1954, a copy of which is attached hereto as Exhibit "A".

3. As a result of the entry of the termination assessment by the Secretary or his agents, the Internal Revenue Service filed a Federal Tax Lien against FERNANDEZ in the sum of $2,848,181.00, a copy of which is attached hereto as Exhibit "B".

4. As a result of said termination assessment and the filing of a Federal Tax Lien, the Secretary or his agents executed notice of levy on the National Bank of North America in New York against one account held in the name of Petitioner INVERSAL and allegedly owned

by FERNANDEZ.

5. Within thirty (30) days after the day on which FERNANDEZ was furnished with the written statement called for by Paragraph (a)(1) of Section 7429 of the Internal Revenue Code of 1954, FERNANDEZ requested administrative review through counsel, a copy of which is attached hereto as Exhibit "C".

6. The Secretary was requested to determine whether or not the making of the assessment under Section 6851 was reasonable under the circumstances and whether the amount so assessed or demanded as a result of the action taken under the foregoing Section was appropriate under the circumstances.

7. At the Secretary's request, the Petitioner's appellate hearing was postponed until October 20, 1981.

8. On November 2, 1981, the Secretary denied Petitioner's claim that the

Department of Treasurer had unreasonably and inappropriately assessed income to Petitioner FERNANDEZ. A copy of the Secretary's notification is attached hereto as Exhibit "D".

9. This action is filed within thirty (30) days after the day that the Secretary notified the Petitioner of the administrative determination.

10. This action is also filed within thirty (30) days after the sixteenth (16) day after the request for review was made to the Secretary of the Treasury (October 20, 1981).

11. Under the provisions of Title 28 U.S.C. 1401 (c) wherein the United States is a defendant, venue lies in the judicial district in which the event occurred which gave rise to the cause of action; the assessment, notice of lien, and levy attempt were made in or from Dade County, Florida within the

jurisdiction of the United States District Court for the Southern District of Florida.

12. FERNANDEZ is a nonresident alien. not engaged in any trade or business in the United States.

13. INVERSAL is a Colombian limited partnership not engaged in any trade or business in the United States.

14. It is a fact that nonresident aliens not engaged in a trade or business in the United States are not subject to income tax in the United States. Therefore, termination of the taxable year, notice of lien and attempted levy against Petitioner cannot possibly be reasonable if Petitioner is not subject to United States income tax by reason of his being a nonresident alien not engaged in a trade or business in the United States.

15. If this Court determines that

Petitioner is engaged in a trade or business in the United States, Petitioner respectfully requests this Court to abate the termination assessment on the grounds that it was not reasonable under the circumstances and that the amount assessed was not appropriate under the circumstances.

16. The Petitioner acts as a broker for nonresident aliens through the operation of bank accounts in the United States and therefore cannot be deemed to be engaged in a trade or business in the United States. See generally, Regulation 1.864-2(c) and 1.864-2(d).

MEMORANDUM OF LAW

A nonresident alien can be taxed in the United States only on income connected with a United States business or on income derived from interest, dividend, rents, salaries, wages,

premiums, annuities, compensations, remunerations, and other fixed or determinable annual or periodical gains, profits and income. IRC §871(l)(A).

Nonresident aliens, not engaged in a trade or business in the United States and not receiving United States source income are not taxable in the United States. Reg. 1.871-2 through Reg. 1.871-13, promulgated by the Internal Revenue Service.

Before the United States is permitted to offer proof of reasonableness of the assessment under the guidelines of Haskin v. United States, 78-1 USDC 9197, 444 F. Supp. 299 (that the taxpayer is about to depart from the United States or conceal himself or to place his property beyond the reach of the government, etc.), the government must first cross the initial threshold as to whether Petitioner is a taxpayer at all. McAvoy v. IRS, U.S.

D.C. West District, Michigan, No. 79-266, 7/3/79).

Mere bank deposit activity is legally insufficient to establish that Petitioner is engaged in a trade or business in the United States, and, in fact, is inadmissible as evidence for that purpose. See generally, Regulation 1.864-2(c) and 1.864-2(d). See also, Internal Revenue Code §861(c)(1) as to non-United States source of bank interest. See Committee Report on Public Law, 93-625(0.010) "Exclusion from Gross Income of U.S. Bank Deposits Held by Non-Resident Aliens." Clearly, if such interest is exempt, if not effectively connected with conduct of a trade or business within the United States, then the act of depositing the potential interest generating funds in the bank account is not, by definition, a trade or business.

However, if this Court determines that Petitioner is engaged in a trade or business in the United States, Petitioner respectfully submits that the termination assessment was arbitrary and capricious based upon the fact that Petitioner merely acts as a nonresident alien broker and the following law:

The Petitioner's bank deposits cannot be treated as taxable gross income where thePetitioneracts as an agent for the funds or others. Kaas 1BTA 1115, Dec. 430 (Acq.). (CCH ¶2767/0521 p. 35,076). See also M. Gaspar, 27 TCM 634, TC Memo 1968-131 (CCH ¶2767.0560 p. 35,081) and Lloyd S. Elder, 9 TCM 59 (CCH ¶2767.0531 p. 35,076), where it was held that certain deposits were wrongfully assessed as gross income where the taxpayer operated a check cashing service.

WHEREFORE, Petitioners respectfully pray for an order of the Court requiring

Respondent to show cause why a Peremptory Writ should not be issued declaring the termination assessment void, release the claim of lien, release the levy on Petitioner's bank account, and return all property seized, if any.

Respectfully submitted,

HALL AND HAUSER, P.A.
Attorneys for Petitioner
Suite 200, Brickell Concours
1401 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 374-5030

By: /S/
ANDREW C. HALL

INTERNAL REVENUE SERVICE

Mr. Arturo Fernandez
A/K/A Turi Fernandez
2333 Brickell Avenue #901
Miami, Florida

August 3, 1981

NOTICE OF TERMINATION ASSESSMENT OF INCOME TAX

Dear Mr. Fernandez:

Under section 6851 of the Internal Revenue Code, you are notified that I have found you designing to quickly place property beyond the reach of the Government by either concealing or dissipating it thereby tending to prejudice or render ineffectual collection of income tax for the current taxable year. Accordingly, the income tax, as set forth below, is due and payable immediately.

| Taxable Year | Tax | Penalty |
|---|---|---|
| 1/1/81 to 7/28/81 | $2,848,181.00 | -0- |

Based on information available at this

time, tax and penalty, if any, reflected in the attached computations, have been assessed.

This action does not relieve you of the responsibility for filing a return for your usual annual accounting period under section 6012 of the Code. Such return must be filed with the office of the District Director of the district in which you reside, or the district in which your principal office is located, not with the Internal Revenue Service Center. A copy of this letter should accompany the return so that any amount collected as a result of this termination assessment will be applied against the tax finally determined to be due on your annual return or to be credited or refunded.

Under section 7429 of the Internal Revenue Code, you are entitled to request administrative and judicial reviews of

this assessment action.

For an administrative review, you may file a written protest with the District Director within 30 days from the date of this letter, requesting redetermination of whether or not:

1. the making of the assessment is reasonable under the circumstances, and

2. the amount so assessed or demanded as a result of the action is appropriate under the circumstances.

A conference will be held on an expedited basis by the Regional Appeals Office to consider your protest.

If you submit information or documentation for the first time at an Appeals conference, the Appeals Office may request comment from the District Director on such evidence or documents.

As indicated above, enforced collection action may proceed during any administrative appeal process unless

arrangements are made regarding collection of the amount assessed. To make such arrangements, please contact Tom Karras 305-350-4364.

You may request a judicial review of this assessment by bringing a civil suit against the United States in the U.S. District Court in the judicial district in which you reside or in which your principal office is located. However, in order to have this action reviewed by the District Court, you must first request administrative review within 30 days after the earlier of (1) the day the Service notifies you of its decision on your protest, or (2) the 16th day after your protest. The Court will make an early determination of the same points raised in your protest to determine whether the making of the assessment is reasonable under the circumstances and to determine whether the amount assessed or

demanded as a result of the action is appropriate under the circumstances. The Court's determination is final and not reviewable by any other court.

Very truly yours,

/S/
Charles O. DeWitt
District Director

Enclosure
Computation

FORM 668 NOTICE OF FEDERAL TAX LIEN
UNDER INTERNAL REVENUE LAWS

District: Jacksonville, Florida

Taxpayer: Arturo Fernandez A/K/A
Tuni Fernandez
Residence: 2333 Brickell Avenue
#901
Miami, Florida 33129

Kind of Tax: 1040

Tax Period Ended: 1/1/81 thru 7/28/81

Date of Assessment: 8/3/81

Identifying #: 910-07-7901

Unpaid Balance of Assessment:

$2,843.181.00

Place of Filing: Dade County
Clerk, Circuit Court
Miami, Florida

Prepared & Signed: Miami, Florida on the
4th day of August,
1981.

Signature: /S/
TOM KARRAS

Title: Revenue Officer

HALL AND HAUSER, P.A.

August 27, 1981

HAND DELIVERY

District Director of
Internal Revenue
51 Southwest First Avenue
Miami, Florida 33130

ATTN: ALAN PASTERNAK; 1602

Re: Arturo Fernandez - Taxpayer
Termination Assessment dated
8/3/81
Our File No. 81-3775

Dear Sir:

Pursuant to Section 7429(a)(2) of the Internal Revenue Code and the regulations thereunder, request is hereby made for review of the termination assessment made pursuant to Section 6851(a) of the Internal Revenue Code for the above-named taxpayer in the amount of $2,848,181. In particular, taxpayer believes that making a termination assessment was not reasonable under the circumstances and that the amount assessed was not appropriate under the circumstances and,

therefore, the assessment should be abated.

If, after your preliminary review, you do not agree with the taxpayer that the assessment should be abated, taxpayer respectfully requests a conference with the Appeals Office so that he may be heard. Please address all communications in connection with this matter to me, the taxpayer's attorney, Andrew C. Hall, c/o Hall and Hauser, P.A., Suite 200. Brickell Concours, 1401 Brickell Avenue, Miami, Florida 33131. A power of attorney (Form 2848) authorizing me to represent the taxpayer in connection with this matter is being forwarded herewith and has been mailed to the Internal Revenue Service Office in Jacksonville, Florida.

The facts upon which taxpayer relies are as follows:

1. Taxpayer visits the U.S. regularly

and has no intent or design to conceal himself from the government.

2. Taxpayer has no design to place his property beyond the reach of the government either by removing it from the country, or concealing it, or by transferring it to other persons, or by dissipating it.

3. Taxpayer's financial solvency is not in peril (except for the improper taking of funds by way of a termination assessment).

4. The assessment dated August 3, 1981 erroneously assumes that all deposits made to bank account No. 2-199-20357-8 at the National Bank of North America ("the Account") represent income from sales and that 50% of such amount represents cost of sales. In fact, the deposits to the account represent funds of persons unrelated to taxpayer. Said funds were received from unrelated

persons and transmitted on behalf of such persons by bank transfer to the Account. In exchange for providing this transfer service a commission is paid outside the United States equal to less than one-half of one percent of the amounts transferred.

In view of the foregoing, it is apparent that (a) the moneys transferred and deposited to National Bank of North America are not income from sales; (b) the amount, if any, of income derived from these transactions was income earned outside the United States and is not subject to U.S. income taxation, and (c) the amount of gross income earned is less than one-half of one percent of the amount deposited to the Account and not 50 percent.

Therefore, it is requested that the assessment be abated in full (or, alternatively, that the assessment be

reduced, based on a gross income before expenses of $40,936.

Respectfully,

/S/
Andrew C. Hall

Enclosures

INTERNAL REVENUE SERVICE

Regional Southeast Region

Mr. Andrew C. Hall
Hall & Hauser, P.A.
1401 Brickell Avenue
Miami, Florida 33131

Department of the Treasury

Address any reply to Appellate Division
Rm. 316, 51 S.W. 1st Ave., Miami,
Florida 33130

Person to Contact:

Joseph M. Rodriguez
Telephone No. (305) 350-4426

Refer Reply to:

AP:MIA:JMR

Date: Nov. 2, 1981

In Re: Administrative Review of
Termination Assessment for
the period 1/1/81 through
7/28/81 of Arturo Fernandez

Dear Mr. Hall:

We have considered the evidence and arguments submitted in the above-captioned matter and we have concluded that the making of the assessment by the District Director is reasonable, and the amount so assessed is appropriate under

the circumstances. This concludes the administrative review prescribed by Section 7429(a) of the Internal Revenue Code.

Sincerely,

/S/
Joseph M. Rodriguez
Appeals Officer

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CIVIL NO. 81-2531-CIV-SMA

ARTURO FERNANDEZ and INVERSAL ADMINISTRACION E INVERSIONES LTD., a Colombian Limited Partnership,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

MOTION TO DISMISS

Respondent United States of America, by and through its attorney, Atlee W. Wampler, III, United States Attorney for the Southern District of Florida, hereby moves the Court to dismiss this action on the grounds that the Court lacks jurisdiction of this action by petitioner Inversal Administracion E Inversiones Ltd. and the Court lacks venue of this action by petitioners Arturo Fernandez and Inversal Administracion E Inversiones

Ltd. for judicial review under Section 7429 of the Internal Revenue Code of 1954 (26 U.S.C.), and that the action by petitioners is barred by the time limitations contained in Section 7429 of the Code.

ATLEE W. WAMPLER, III
United States Attorney

By: /S/
RANDALL M. RODEN
Trial Attorney,
Tax Division
Department of Justice
Washington,D.C. 20530
Telephone:
(202) 724-6522
FTS 724-6522

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CIVIL NO. 81-2531-CIV-SMA

ARTURO FERNANDEZ and INVERSAL ADMINISTRACION E INVERSIONES LTD., a Colombian Limited Partnership,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER OF DISMISSAL

THE COURT having received ore tenus notice of voluntary dismissal without prejudice of its cause by Counsel for INVERSAL ADMINISTRACION E INVERSIONES LTD. and said Counsel having represented to the Court that an Order of Dismissal is proper, it is accordingly

ORDERED AND ADJUDGED that claims of Petitioner INVERSAL ADMINISTRACION E INVERSIONES LTD. in the above-captioned cause are hereby DISMISSED WITHOUT PREJUDICE.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of January, 1982.

/S/
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Randall M. Roden, Dept. of Justice
Andrew C. Hall, Esq.